

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Pascua Yaqui Tribe of Arizona
Docket No. A-99-61
Decision No. 1692

DATE: June 1, 1999

FINAL DECISION ON REVIEW OF
RECOMMENDED DECISION
OF ADMINISTRATIVE LAW JUDGE

The Pascua Yaqui Tribe of Arizona (the Tribe) and the Indian Health Service (IHS) appealed the April 6, 1999 recommended decision by Administrative Law Judge (ALJ) Nicholas T. Kuzmack regarding IHS's partial declination of the Tribe's proposal, submitted pursuant to the Indian Self-Determination Act, as amended (ISDA), to contract for health care programs, functions, services and activities (PFSAs) (ALJ Decision). The primary issue on appeal is whether the ALJ determined the appropriate funding level for the health maintenance organization (HMO) through which most of the Tribe's health care services were provided. IHS declined the Tribe's proposal to contract for this function to the extent IHS determined that the Tribe's proposed funding exceeded the amount to which the Tribe was entitled under the ISDA. As discussed in detail below, I conclude that the ALJ did not err in finding that IHS clearly demonstrated the validity of the declination with respect to this function. Specifically, I conclude that the ALJ did not err in finding that IHS properly determined that the Tribe was entitled to an amount equal to the recurring funding that IHS allocated for the HMO to the area office serving the Tribe during the period immediately prior to the period to be covered by the contract. This is a

reasonable interpretation of the statutory requirement that the amount of funds awarded under a selfdetermination contract--known as the "Secretarial amount"--not be less than the Secretary "would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract" This interpretation is, moreover, consistent with other provisions of the ISDA as well as other statutes under which IHS provides health care services to Indian tribes. The Tribe's proposal for a Secretarial amount that would cover the cost of its existing package of benefits for all members of the Tribe who may become eligible to enroll in the HMO seeks a guarantee of funding for which there is no basis in present law.

I further conclude that the ALJ did not err in finding that IHS clearly demonstrated the validity of the declination with respect to the Headquarters Shares and Facilities Support PFSA. However, I remand the case to the ALJ with respect to the Dental Service component of the Contract Health Services PFSA since he failed to determine how the Secretarial amount should be calculated or whether IHS should be required to assign a dentist to provide services under the contract for this PFSA. I also remand the case to the ALJ to make a determination as to the cost of the residual functions of the area office for purposes of determining the Secretarial amounts for the Administration & Management and Chief Medical Officer PFSA.

Statutory Background

The Secretary of HHS through IHS, administers Indian health care PFSA's pursuant to the Snyder Act, 25 U.S.C. § 13, which gives IHS broad power to "direct, supervise, and expend such moneys as Congress may . . . appropriate, for the benefit, care and assistance of Indians for the . . . relief of distress and conservation of

health." ¹ The Indian Health Care Improvement Act, Public Law No. 94-437, as amended, 25 U.S.C. § 1601 et seq., supplements IHS's broad authority under the Snyder Act and authorizes appropriations in several categories of health care.

The ISDA, Public Law No. 93-638 as amended, 25 U.S.C. § 450f et seq., directs IHS to award "self-determination" contracts to tribal organizations to provide PFSA's for the benefit of Indians that had previously been provided by IHS. Section 102 of the ISDA. Section 102(a)(2) provides that the Secretary of the Department making the award (the Department of Health and Human Services (HHS) or the Department of the Interior (DOI)) must approve a tribal organization's proposal for a self-determination contract unless the Secretary makes one of five specific findings. Section 102(a)(2). The finding that was the primary basis for the partial declination appealed here is that the amount of funds requested exceeds the applicable funding level for the contract as determined under section 106(a). Section 102(a)(2)(D). In such cases, the Secretary is still required to "approve a level of funding authorized under section 106(a)." Section 102(a)(4).

Section 106(a)(1) provides that the amount of funds awarded under a self-determination contract--

shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program,

¹ The Snyder Act applies by its terms only to the Bureau of Indian Affairs in the Department of the Interior. The Indian Hospitals and Health Facilities Act, 42 U.S.C. § 2001, transferred responsibility for Indian health to the Department of Health and Human Services.

function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

Section 106(a)(2) provides that, in addition to the amount specified in section 106(a)(1), contract costs shall include "contract support costs" for the costs of activities which must be carried out by the contractor but are not normally carried on by the Secretary in the direct operation of the program.

Section 106(b)(2) requires that, once a self-determination contract has been awarded, the amount of funds awarded for the contract in subsequent years shall not be reduced except in certain specified circumstances (such as reduction in federal appropriations for the contracted activity or completion of the activity).

Section 106(b)(5) provides that "[n]otwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act."

A tribal organization whose contract proposal has been declined is entitled to a hearing on the record, with the right to engage in full discovery relevant to any issue raised. Section 102(b)(3). The implementing regulations at 25 C.F.R. § 900.163 provide for an opportunity for a hearing by an ALJ. At the hearing, the Secretary has the burden of proof to clearly demonstrate the validity of the grounds for declining the contract proposal. Section 102(e)(1); 25 C.F.R. § 900.163.

Any party may appeal the ALJ's recommended decision with respect to a declination by IHS to the Secretary of HHS by filing written objections to the ALJ's recommended decision within 30 days after receiving it. 25 C.F.R. § 900.166. The Secretary has 20 days from the date she receives any timely objections to modify, adopt, or reverse the recommended decision. 25 C.F.R. § 900.167.

On August 16, 1996, the Secretary delegated her authority to hear such appeals to the Appellate Division of the Departmental Appeals Board. I have been appointed by the Board Chair as the deciding official in this case. I must uphold the ALJ's decision unless I determine that it was based on an error of fact or law.

Factual Background

The following facts are derived from the ALJ Decision and are undisputed.

IHS operates two types of health care programs for Indian tribes: (1) direct services, where the tribe receives health care services through federally-operated health care facilities, and (2) contract health services, where the tribe receives health care services from private health care providers. Under the ISDA, a tribe may also enter into a self-determination contract with IHS whereby federal funding is provided directly to the tribe for self-administration of the health care PFSA formerly carried out by IHS for the benefit of the tribe. Certain administrative functions, known as "residual functions," cannot be contracted to a tribe under a self-determination contract, however, but must be performed by IHS. The cost of the residual functions of an IHS area office is taken into account in determining the funding level for all contracts awarded by that area office.

After receiving a lump-sum appropriation from Congress, IHS Headquarters allocates funds for each PFSA to its 12 area offices. The area offices then obligate those funds, by PFSA, to provide health care services to Indians. IHS Headquarters also retains a small part of IHS's lump-sum appropriation for three discretionary funds: the IHS Director's Emergency Fund, the Management Initiative Fund and the CHS Reserve Fund. Any monies remaining in the first two funds at the end of the fiscal year are distributed to each of the 530 tribes in the nation on a pro rata basis in accordance with their user populations. The user population is defined as the number of individuals that have utilized the IHS health care system at least once within the most recent three

year period for which data is available. Any monies remaining in the third fund on August 15 of the fiscal year are distributed to the area offices for IHS and tribal programs. Both parties agree, and the ALJ found, that congressional appropriations to IHS are limited and have historically been insufficient to fully meet the needs of Indian tribes nationwide for health care services. According to IHS, it funds health care services at approximately 60% of the level of need. Moreover, in the past, IHS has not provided any contract support costs for new self-determination contracts, but has instead placed tribes in a "queue" to await the availability of such funds.

The Tucson Area Office administers health care services for two tribes, the Tribe and the Tohono O'odham Nation, as well as oversees health care services for the Urban Group. The Tohono O'odham Nation receives direct services, which are provided in a hospital and two health clinics. The Tribe receives contract health services, primarily through a capitated health management contract with a non-profit HMO which is the only HMO contract that IHS has.² Certain other PFSA's are provided to the Tribe through contracts with other private health care providers rather than through the HMO.

IHS's contract with the HMO requires monthly prepayment of premiums to the HMO for each member of the Tribe enrolled in the HMO. Since the HMO began providing health care services to the Tribe, the Tribe's enrollment has increased, primarily due to the fact that Congress took the rare step of re-opening the Tribe's enrollment for a three-year period ending October 14, 1997.³

² Another tribe with a self-determination contract provides services to its members through an HMO. Tribe's Objections to ALJ Decision, dated 5/10/99, at 16, n.13.

³ The Tribe stated that it was still evaluating applications for tribal membership and anticipated completing this process "within the next two years."

(continued...)

However, not all enrolled members of the Tribe are eligible for enrollment in the HMO health plan. To be eligible for the latter, a tribal member must also be a resident of Pima County, Arizona, and must not have an alternate resource such as private health insurance, Medicaid or Medicare.⁴

IHS first entered into a contract with the HMO for the provision of health care services to the Tribe around 1980. Prior to expiration of the contract in May 1998, IHS determined that there would be insufficient funds for a new contract because the estimated cost of providing the existing health benefits package would exceed the amount currently allocated to the Tucson Area Office for the HMO. To afford the Tucson Area Office time to resolve the need for additional funding, IHS provided \$585,000 in supplemental funding to the Tucson Area Office from the IHS Director's Emergency Fund in April 1998 and extended the contract for a six-month period (and has since further extended the contract).

The Tribe submitted a proposal to enter into a self-determination contract to assume certain PFSA's, including the services provided by the HMO, which was received by IHS on July 21, 1998. The proposal stated that the "starting date shall be determined based on the availability of contract support cost funding for the proposed contract" and that the Tribe "expects to negotiate mutually agreeable starting date(s) for those particular program activities which the tribe decides to assume and implement at its own financial risk in advance of receipt of the required allocation of contract support funds." During the proceedings before me, however, the

³ (... continued)

Tribe's Response to Board Questions, dated 5/18/99, at 13.

⁴ During the proceedings before me, the Tribe pointed out that the number of those eligible for enrollment in the HMO could fluctuate from month to month based on these two factors.

Tribe stated that it would not delay entering into the self-determination contract regardless of when contract support costs are made available. Tribe's Response to Board Questions, dated 5/18/99, at 19.

By letter dated October 20, 1997, IHS declined substantial portions of the proposal. The Tribe requested a hearing on the partial declination pursuant to 25 C.F.R. Part 900, Subpart L. An in-person evidentiary hearing was held in June 1998 and was followed by the submission of post-hearing briefs. Prior to the issuance of the ALJ's recommended decision, IHS moved to dismiss the Tribe's hearing request on the ground that it was rendered moot by a provision of the 1999 supplemental appropriations bill which prohibited use of any fiscal year 1999 funding to enter into any "new" contracts under the ISDA. By order dated November 23, 1998, the ALJ granted IHS's motion to dismiss. On appeal by the Tribe, I reversed the ALJ's order of dismissal and remanded the case to the ALJ for issuance of a decision on the merits. Pascua Yaqui Tribe of Arizona, DAB No. 1676 (January 12, 1999), reconsideration denied February 4, 1999.

On April 6, 1999, the ALJ issued a decision which recommended upholding the partial declination with respect to all but two of the PFSA's at issue and remanded the case to IHS to determine the amount to be deducted from the cost of those two PFSA's for residual functions of IHS's Tucson Area office. Both parties timely appealed the ALJ's recommended decision on the partial declination.

During the 20-day period for my consideration of the appeals, I requested that the parties respond in writing to each other's objections as well as respond to a list of my questions designed to facilitate my review of the appeals. In addition, I held a telephone conference at which the parties were given an opportunity to supplement their responses to the questions, to comment on each other's responses, and to summarize their positions on appeal, as well as requested to respond to additional questions posed by me. (The transcript of the telephone conference was not available prior to the due date for

issuance of the decision but will be included in the record.) I also requested that the parties provide some information in writing after the telephone conference.

Matters in Dispute

This case concerns the amount of funding the Tribe was entitled to receive for a contract with IHS to assume a number of health care PFSA's under the ISDA. As noted above, the ISDA provides that this amount shall not be less than the Secretary "would have otherwise provided for the operation of the programs . . . for the period covered by the contract" This is referred to as the "Secretarial amount."

According to the ALJ Decision, the Tribe proposed to assume the following PFSA's in the following amounts:

- Administration & Management--\$205,125;
- Chief Medical Officer--\$78,528;
- AIDS Coordinator--\$15,191;
- Pascua Yaqui-Health System Delivery--\$82,734;
- Mental Health--\$50,453;
- Social Services--\$25,024;
- Alcohol/Substance Abuse--\$180,015;
- Facilities Support--\$22,627;
- Contract Health Services--\$9,721,263; and
- Headquarters Shares--\$166,993.

The parties agree on the amount for several of these PFSA's, leaving in dispute the following PFSA's:

- Administration & Management;
- Chief Medical Officer;
- Facilities Support;
- Contract Health Services; and
- Headquarters Shares.

According to the ALJ Decision, the Contract Health Services PFSA consists of five components, for which the Tribe proposed funding as follows:

- Health Maintenance Organization--\$9,343,277;
- Fee-for-Service--\$151,528;
- Dental Service--\$185,178;
- Patient Advocate--\$32,655; and
- Home Health Service--\$50,453.

Of these PFSA's, the following remain in dispute:

Health Maintenance Organization; and
Dental Service.

Also in dispute is whether the Tribe is entitled to have IHS assign a dentist who is a commissioned officer of the Public Health Service to provide dental services under the Tribe's self-determination contract which would be paid for by contract funds.⁵

Analysis

Below, I first discuss the HMO component of the Contract Health Services PFSA since \$9,343,277 of the Tribe's \$10,553,953 contract proposal is attributable to this component. I then discuss the remaining PFSA components of PFSA.

1. Health Maintenance Organization (HMO)

The Tribe's proposed amount of \$9,343,277 for the HMO component of the Contract Health Services PFSA was calculated by first multiplying \$117.26, representing a monthly per capita HMO premium, by 6,640, representing the estimated number of HMO enrolled members, to arrive

⁵ The Tribe also identified as one of the matters in dispute "whether the Tribe should have been added to the contract support costs queue based upon a requested start date in FY 1998 and a contract proposal receipt date of July 21, 1997" Tribe's Response to Board Questions, dated 5/18/99, at 4. See also Tribe's objections to ALJ Decision, dated 5/10/99, at 39. However, the ALJ found that this was precisely what should occur. See ALJ Decision at 31, n.4. Thus, there is no basis for an appeal on this issue. (IHS stated during the proceedings in this matter, however, that the queue system has been discontinued as of fiscal year 1999 and that IHS is developing another method for distributing contract support costs. 5/21/99 telephone conference.)

at an estimated monthly premium amount.⁶ This figure was then multiplied by 12 to yield an annual amount for the HMO.

IHS determined that the Secretarial amount for the Contract Health Services PSFA, including this component, is equal to \$4,313,836, the amount of IHS funds allocated to the Tucson Area Office which was expended for the Tribe's contract health services in fiscal year 1997, the year the Tribe's proposal was submitted. Neither IHS nor the ALJ specified a Secretarial amount solely for the HMO component of this PFSA. The ALJ determined that this was the correct Secretarial amount for this PFSA.

In determining that \$4,313,836 is the correct Secretarial amount, the ALJ also applied an equity test by asking whether the criteria by which IHS determined this amount were rationally aimed at an equitable distribution of IHS funds to all of the potential beneficiaries (530 tribes). The ALJ concluded that "IHS clearly demonstrated that it properly followed its own policies and criteria for allocation of funds, developed with consultation with tribal representatives, and those policies and criteria are rationally aimed at an equitable distribution of health care services to all the tribes." ALJ Decision at 29.

During the proceedings before me, IHS stated that, due to an increased appropriation, all of the Tribe's contract health services are currently being funded out of lump sum appropriations totalling approximately \$5.8 million (based on the \$4,313,836 provided by IHS in fiscal year

⁶ The Tribe stated that, at the time it prepared its proposal, the \$117.26 figure "was within the range predicted by IHS staff and was, in fact, developed based upon information provided by IHS." Tribe's Response to Board Questions, dated 5/18/99, at 5, n.2, citing Tr. at 1679. IHS stated in the proceedings before me that it had determined that the current premium amount for the HMO was \$93.82 per eligible member per month. IHS letter dated 5/25/99, at 1.

1997 plus an increase of approximately \$1.5 million designated for the HMO). IHS stated that it "is willing to enter a contract with [the Tribe] based on what it is currently spending for services to (the Tribe)." See IHS Response to Appellant's Objections, dated 5/18/99, at 22.⁷ (IHS appeared to take the position that a separate Secretarial amount should be calculated for each PFSA but that the Tribe could use funds awarded for one component of a PFSA for another component (e.g., excess funds awarded for the Tribe's HMO could be used for dental services). 5/21/99 telephone conference.) IHS asserted, and the Tribe did not dispute, that current expenditures were sufficient to provide HMO services to all Tribe members now eligible for such services.

The Tribe maintained, however, that the Secretarial amount should be "an amount of funding necessary to fully fund the HMO program for each member of the Tribe who is eligible to enroll in . . . the HMO." Tribe's Response to Board Questions, dated 10/18/99, at 7. The Tribe viewed the ISDA as effectively guaranteeing that the Secretarial amount under its self-determination contract would be sufficient to provide the existing package of health care benefits to all eligible persons even as the cost of these benefits and/or the tribal membership increases.⁸ The Tribe also argued that, if the amount of recurring funds (i.e., funds allocated for other than one-time expenditures) allocated to the Tucson Area office was not sufficient to cover the cost of this

⁷ IHS subsequently stated that it distributed the \$1.5 million to the Tribe based on information provided by the Tribe which has proven to be inaccurate. IHS further stated that it is "unknown" what action, if any, IHS will take on this matter. IHS letter dated 5/25/99, at 2.

⁸ As discussed later, it appears that, if the Secretarial amount were calculated pursuant to this methodology using current figures, that amount would be substantially lower than the \$9,343,277 proposed by the Tribe.

package of benefits and Congress did not appropriate supplemental funds for this purpose, IHS must use funding from its Headquarters discretionary accounts to guarantee the Tribe its existing package of benefits. The Tribe further argued that this was an equitable amount of funding because the services provided by an HMO cannot be deferred or rationed to reduce costs and because its tribal enrollment was increasing.

The parties thus framed the dispute in terms of the proper methodology for establishing the Secretarial amount for the HMO component of the Contract Health Services PFSA. A decision which merely determined the correct Secretarial amount as of the date of the partial declination for this and other PFSAs would be of no practical use to the parties. A determination as to the proper methodology permits adjustment of the Secretarial amount to reflect the situation as of the time a contract is entered.

I conclude that the ALJ did not err in setting a funding level based on the recurring funding that IHS allocated to the Tucson Area Office for this component for the period immediately prior to the period to be covered by the proposed contract. That is clearly a reasonable interpretation of the statutory language in question since the best indication of what the Secretary would have otherwise provided is what the Secretary already is providing for the same function. Moreover, as I discuss below, this interpretation best implements the purposes of the ISDA as well as of the existing health care programs administered directly by IHS under the Snyder Act and the Indian Health Care Improvement Act.⁹ The

⁹ My construction of section 106(a)(1) is based on its language and its relationship to other provisions of the ISDA and to the other statutes under which IHS operates since the legislative history of this provision is not particularly illuminating. For example, the House report stated only that section 106(a)(1) "provides that the amount of any funds provided to a contractor under a

(continued...)

purpose of the ISDA is to permit the transfer of responsibility for the operation of health care functions from IHS to the tribes. The ISDA does not authorize any additional funding for any of the programs that are transferred to the tribes nor does it authorize additional funding for existing programs remaining under the supervision of IHS. Indeed, section 106(a)(4) provides that any improvements or enhancements in a tribe's health care system following the implementation of a contract would arise from economies exercised by the tribe in the administration of the program.

Thus, when IHS approves a contract proposal, IHS cannot expect to receive any additional funding for the new contract other than the funding that it was already using itself to provide the same programs to the tribe. If IHS were to guarantee a higher level of reimbursement under self-determination contracts under these circumstances, it would correspondingly be forced to diminish funding elsewhere within its programs. Even if IHS were inclined to reduce funding in programs affecting other tribes, it is largely precluded from doing so by the ISDA itself. For example, the Secretary may not reduce funding in subsequent years for existing self-determination contracts except under very limited circumstances. Section 106(b)(2). Section 106(b)(5) further provides that the Secretary is not required to reduce funding for programs serving one tribe to make funds available to another tribe.¹⁰

⁹ (... continued)

contract shall not be less than the amount the Secretary would have expended had the United States performed the service itself." H.R. REP. NO. 1600, 93rd Cong. 2nd Sess. at 9 (1974).

¹⁰ This does not mean that a tribe which expects a substantial change in circumstances after the starting date of its self-determination contract cannot request additional funding for that special circumstance, either in its initial proposal or as part of its annual renewal.

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Moreover, there is no suggestion in the ISDA that Congress intended to remove from IHS the discretion it has traditionally retained to decide how to distribute its lump-sum appropriations for the benefit of all of the tribes nationwide. This discretion has been recognized by the Supreme Court, which held in Lincoln v. Vigil, 508 U.S. 182 (1993), that IHS funding decisions under the Snyder Act, the Indian Health Care Improvement Act and applicable lump-sum appropriations acts were committed to the agency's discretion in that the relevant statutes were drawn so that a court would have no meaningful standard against which to judge the agency's exercise of

¹⁰ (... continued)

IHS, however, reasonably must retain the discretion to evaluate such a request in light of the expected size of future lump sum appropriations and in light of future changed circumstances in the programs it administers or in other self-determination contracts. I note that the ALJ specifically acknowledged in his recommended decision that IHS did and does have some obligation to address the unusually large increases in the Tribe's user population which are likely to continue for two more years because of the congressional re-opening of enrollment. The ALJ added:

When faced with unusual ongoing or near certain future increases in user population, IHS, at a minimum, should advise the tribe proposing to contract regarding its options, such as lobbying Congress for additional appropriations or petitioning the IHS Director for an allocation from the Emergency Fund. . . . However, those courses of action must be left to the discretion of the IHS Director and Congress.

ALJ Decision at 27.

discretionary.¹¹ Given the lack of any standard, I agree with the ALJ that it is not an abuse of discretion for IHS to decline to use funds from its Headquarters discretionary accounts to provide a greater amount than IHS currently provides in order to "guarantee" that the Tribe will continue to receive the same package of health care services. Obviously, as soon as IHS had used up its discretionary accounts to fund this guarantee in a self-determination agreement, it would have lost the only flexibility that currently exists for it to treat emergency circumstances arising in the health care programs of all of the remaining tribes.¹²

In any event, the ALJ properly determined that the funds in the discretionary accounts should not be considered in determining the Secretarial amount at issue here because these funds were not currently being used to fund the operation of the Tribe's HMO. As indicated above, section 106(a)(1) necessarily looks at what IHS actually expended for the tribe in question for the PFSA's sought to be assumed. To the extent that the discretionary funds were unspent, spent for PFSA's not sought to be assumed by the Tribe, or spent on other tribes, the funds are not properly considered in determining what the Secretary would have otherwise provided. While there is

¹¹ The Tribe characterized the ALJ Decision as having held that Lincoln was not controlling. However, the ALJ merely stated that Lincoln did not invalidate the holding in an earlier case that those funds determined to be available must be distributed equitably among potential beneficiaries. Compare ALJ Decision at 16-17, 20.

¹² Moreover, contrary to what the Tribe argued, the ALJ's conclusion that IHS need not use discretionary funds is not contrary to the holding in Shoshone Bannock v. Shalala, 988 F.Supp. 1306 (D. Or. 1997), on reconsideration 999 F.Supp. 1395 (D. Or. 1998). That case is distinguishable on grounds including that it addresses the payment of contract support costs rather than the Secretarial amount.

a question whether funds from the IHS Director's Emergency Fund that were in fact used by IHS for the Tribe's contract health services in fiscal year 1997 should have been considered for purposes of a contract assumed immediately thereafter, I conclude that this question is now moot. Since funds from lump-sum appropriations were substituted for the discretionary funds that were used for contract health services in fiscal year 1997, IHS's one-time use of these discretionary funds is no longer relevant.

Furthermore, in asking IHS to provide it with a guarantee of additional funding to maintain a particular level of health care delivery, the Tribe is asking IHS to provide a greater guarantee of funding protection than currently exists even under the health care programs administered directly by IHS. The record here demonstrates that IHS lacked funding from its lump-sum appropriations to cover increased HMO costs for the Tribe beginning June 1, 1998. In order to continue to fund the HMO just in its current form, IHS had to use funding first from one of its special discretionary accounts and then request an additional appropriation (of which approximately \$1.5 million was allocated to the Tribe's HMO). Had there been no money in its discretionary accounts or had IHS been unable to obtain additional funds from Congress, IHS conceivably would have been forced to make arrangements for the provision of a reduced level of services to the Tribe. As IHS stated:

Every IHS and tribal program faces increases due to inflation, major medical cases, increased population, increased costs of contracts, etc. There is no reason to shield one tribe from what every other tribe must face.

IHS Response to Questions from Board, dated 5/18/99, at 6.

Since the Tribe is not entitled to continue to receive the same package of services under the IHS-administered program, it cannot reasonably expect a guarantee of such services under a self-determination contract. That the

Tribe is currently the only tribe with an HMO contract under the supervision of IHS does not change this conclusion. The record suggests that there is a wide variation in the manner in which IHS provides health care services to tribes nationwide. There is no authority in the ISDA, however, to provide one tribe a different amount of funding based on the type of health care delivery system that was in place at the time that the tribe decided to assume responsibility for its health program. Instead, the ISDA asks only what would have otherwise been provided for operation of the program, however situated.

I therefore conclude that the interpretation adopted by the ALJ is a reasonable interpretation of the statutory language and is consistent with the purposes of the ISDA and the authorizing and funding provisions associated with IHS programs as a whole.¹³

I further conclude that the ALJ did not err in determining that the health care services provided under the Tribe's HMO were equitable in comparison to services received by other tribes. Although IHS disputed before the ALJ the applicability of an equity test in determining the appropriate funding level under the ISDA, IHS did not appeal the ALJ's use of an equity test before me. I therefore assume for purposes of this decision that such a test is properly considered when determining whether the statutory standard is met. Presumably, if the services provided to the Tribe had not been on a par with those received by other tribes, this would have supported the Tribe's argument that it was entitled under

¹³ The Tribe's use of essentially the same methodology as IHS to calculate the Secretarial amount for all of its other PFSA's confirms the reasonableness of this interpretation and undermines the Tribe's position that the ISDA should be interpreted differently in this single instance.

section 106(a)(1) to more funds than it is currently receiving for the HMO.¹⁴

The ALJ compared the services received by the Tribe to the services received by the Tohono O'odham Nation as well as to services received by other tribes nationwide, and concluded that the services received by the Tribe are similar, if not superior, although the delivery mechanisms differ. The Tribe challenged the ALJ's finding. I conclude that the ALJ's finding is amply supported by the record, however. The ALJ considered a wide range of indicators, including IHS health care services funding per capita, the outpatient visit rate per user and the inpatient discharge rate. Moreover, the ALJ relied on some of the Tribe's own witnesses in making his finding. Even in its objections to the ALJ's recommended decision, the Tribe conceded that the package of health care services provided to HMO enrollees is "comparable" to the services available to other Indians who IHS directly services through a facility-based program. Tribe's Objections to ALJ Decision, dated 5/10/99, at 15. The Tribe's arguments on appeal primarily fault the ALJ's per capita funding analysis. Even if the per capita funding comparison required adjustment in the manner argued by the Tribe, however, the per capita funding for the Tribe's HMO would still remain within an average range in comparison with the per capita funding for all other tribes. In other areas of comparison, such as with access to or utilization of health care, the Tribe remains in an above average position in comparison with other tribes.

¹⁴ However, the need for equitable treatment as between tribes would also exist if the Tribe were to receive a guarantee of funding sufficient to cover its existing package of health care services. In that case, equity would arguably require that other tribes receive a similar guarantee, a condition that IHS would not likely have sufficient funds to satisfy.

Finally, I note that, although many of the Tribe's arguments give the impression that the parties are far apart concerning the appropriate funding level under the ISDA, in actuality, the parties may not be that far apart. IHS stated that, if it provides the Tribe with the amount that is already being provided to fund its HMO, the Tribe should be able to continue to provide its membership with the same HMO benefit package it is currently receiving for at least three years (as of the time of the hearing in June 1998). IHS Response to Appellant's Objections, dated 5/10/99, at 23, citing Tr. at 1210. On the other hand, the Tribe has proposed a level of funding that greatly exceeds current levels. The Tribe's initial proposal was based on a projected HMO membership of over 6,600 individuals. The Tribe at that time (June 1997) had an HMO membership of 4,184. As of April 1999, the Tribe's HMO membership had still not risen any higher than 4,700. If the Tribe had received its full proposed funding based on the overly optimistic projections, it would have received approximately twice the level of funding that was allowed in the partial declination. Obviously, the guarantee of health care benefits requested in the original proposal considerably overstated the amount needed to replicate the Tribe's existing health care program.

Moreover, the overstatement of future tribal health care needs, as reflected by the Tribe's proposal, reveals the fundamental problem with the Tribe's approach to its self-determination contract. The ISDA requires the Secretary to determine an appropriate amount to be applied immediately upon the Tribe's assuming responsibility for its health care program. In asking for an amount in excess of its current needs, the Tribe appears to be arguing that it is entitled to a cushion of extra funding that would indefinitely protect its membership into the future. Obviously, if a single contract funding amount is to serve as a guarantee of a particular package of health care services for several years into the future, it will have to be based on projections of tribal membership and future health care costs. Even if the projections are well-founded, the Tribe could receive a windfall under the ISDA that would

continue until the projections are realized. If the projections are not well-founded, the Tribe would have received an indefinite, unjustified windfall. The ALJ observed, moreover, that--

Such a system would invite unfairness, inconsistency, and chaos. Among other drawbacks, projections are necessarily fraught with uncertainty and easily subject to manipulation. It would be difficult to avoid the reality or the appearance of arbitrariness if projections were used.

ALJ Decision at 26.¹⁵

Accordingly, I conclude that the ALJ did not err in finding that the Secretarial amount of \$4,313,836 determined by IHS for the HMO component of the Contract Health Services PFSA was correct based on the amount of recurring funds that IHS allocated to the Tucson Area Office for this component during the period in which the Tribe submitted the proposed self-determination contract. The Secretarial amount should be adjusted to reflect any change in the allocation for this component (such as the additional \$1.5 million currently allocated to the Tucson Area Office for the Tribe's HMO) during the period before the Tribe actually contracts to assume responsibility for this component.

¹⁵ The Tribe at one point in the proceedings before me appeared to suggest that it would be willing to contract for an amount lower than the amount in its proposal if the lower amount would guarantee the current level of services for all tribal members who would be eligible to enroll in the HMO. 5/21/99 telephone conference. However, there is absolutely no authority in the ISDA for a formula to be established under the contract that would give the Tribe a fluctuating guaranteed amount based on what the Tribe hypothetically might have received if its HMO continued to exist in its current form.

2. Dental Service

The Tribe's proposal to contract for the Dental Service component of the Contract Health Services PFSA used the amount of \$185,178 based on financial data provided by IHS. After submitting the proposal, the Tribe proposed an amount of \$396,560, stating that it had determined that IHS's financial data was incorrect. According to the Tribe, it received \$219,985 for dental care in fiscal year 1995, \$760,848 in fiscal year 1996 and \$208,848 in fiscal year 1997. Averaging the amounts for these three years yields \$396,560. See Tribe's Post-Hearing Br. at 45; Tribe's Response to Board Questions, dated 5/18/99, at 5-6. IHS based the Secretarial amount of \$185,178 on the amount allocated to the Tucson Area Office for this PFSA for the Tribe in fiscal year 1997. (The discrepancy between this figure and the fiscal year 1997 figure of \$208,848 used by the Tribe in its calculation may be accounted for by the inclusion in the latter figure of additional amounts, such as amounts provided for "special projects," that IHS did not regard as having been provided to the Tucson Area Office on a recurring basis. 5/21/99 telephone conference.)

Although the ALJ listed Dental Service as a component of the Contract Health Services PFSA, the ALJ did not specifically address the calculation of the Secretarial amount for this component.¹⁶ Moreover, in listing \$185,178 as the Tribe's proposed amount for this component, the ALJ ignored the fact that the Tribe increased the proposed amount in the proceedings before him and that the increased amount was calculated based on a different methodology (i.e., a three-year average) than the original amount.

¹⁶ I note also that the sum of the amounts listed in the ALJ Decision for all five components of the Contract Health Services PFSA exceeds the amount identified in that decision as the total proposed funding for that PFSA. See ALJ Decision at 22.

I therefore conclude that this matter should be remanded to the ALJ for a determination, based on the evidence currently in the record and any additional evidence the ALJ requires the parties to present, of the proper Secretarial amount for the Dental Service component of the Contract Health Services PFSA. Even if there is adequate evidence in the present record to make a determination, this determination is appropriately made in the first instance by the ALJ. The regulations require the ALJ to make "findings of fact and conclusions of law on all of the issues." 25 C.F.R. § 900.165(a). The Secretary, whose authority in this matter has been delegated to me, is simply authorized to modify, adopt, or reverse the ALJ's decision. 25 C.F.R. § 900.167(a). Regardless of which methodology the ALJ determines is appropriate, the amount should be adjusted to reflect the amount allocated or spent for dental services for the one- or three-year period (as the ALJ determines appropriate) immediately preceding the period during which the Tribe enters into a contract.

The Tribe also proposed that IHS assign a dentist from the Public Health Service to provide dental services under the contract, pursuant to section 104(b) of the ISDA, which provides that, "upon the request of any Indian tribe . . . , commissioned officers of the [Public Health] Service may be assigned by the Secretary for the purpose of assisting such Indian tribe . . . in carrying out the provisions of contracts with . . . tribal organizations pursuant to" the ISDA. The Tribe would pay for the dentist with funds awarded under its self-determination contract for dental services. IHS declined this portion of the proposal under section 102(a)(2)(C) of the ISDA, which provides for declination where "the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract." The declination letter stated that "there are no Commissioned Officers currently assigned to perform PFSA's which the Tribe proposes to assume, or any positions associated with those PFSA's." Letter dated 10/20/97, at 11. At the hearing, IHS clarified that a commissioned officer was performing services for the Tohono O'odham Nation, so that the basis for the

declination was that the Tribe was proposing to contract for positions which the Tucson Area Office did not currently have. IHS Post-Hearing Br. at 45, citing Tr. at 990.

The ALJ did not reach the issue of whether IHS properly declined to assign a dentist to perform services under the Tribe's self-determination contract. I therefore remand this matter to the ALJ. If the ALJ does not reach this issue because he views it as outside the scope of his review, he should explain the rationale for this conclusion. However, it may be appropriate for the ALJ to stay proceedings regarding this matter since the parties stated that they believed they could reach a resolution themselves. 5/21/99 telephone conference.

3. Headquarters Shares

The Tribe proposed \$166,993 as the amount of Headquarters funding to which it was entitled. Each tribe with a self-determination contract is entitled to receive an amount representing its share of the cost of non-residual administrative functions performed at IHS Headquarters. IHS partially declined this portion of the proposal on the ground that only \$77,079 of the Secretarial amount of \$166,993 was immediately available.¹⁷ The Tribe did not challenge this partial declination. However, the Tribe challenged IHS's determination of the Secretarial amount on the ground that that amount was calculated based upon a user

¹⁷ The amount not immediately available would be distributed to the Tribe pursuant to the Tribal Shares Transfer Policy. This policy “provides that IHS shall transfer on the effective start date of an ISDA contract 100% of that portion of the contract applicant's allocable share that is in liquid form It also requires transfer of at least 50% of [the] encumbered portion of the allocable share within 12 months after the start date and transfer of 100% of the encumbered portion within 24 months of the start date” ALJ Decision at 13.

population figure of 3,839. The Tribe contended that this figure should have been at least as high as the 4,069 user population figure employed to calculate the Area tribal share (i.e., the Tribe's share of the cost of performing non-residual Tucson Area Office administrative functions).¹⁸ There is no dispute that, although IHS stated in its declination letter that it had used 4,069 to determine both the Tribe's Area and Headquarters shares, it in fact used the lower figure to determine the Headquarters shares.

The ALJ found that IHS had established that 3,839 "derived from the most recent computation for that purpose in approximately FY 1995" and was the correct figure since IHS's policy was to recompute the user population figures for Headquarters shares purposes once every three to five years. ALJ Decision at 29. The ALJ further stated that the 4,069 figure was derived from more recent data which was "not at hand at the time of the declination" and was not the applicable figure for determining Headquarters shares. Id.

On appeal, the Tribe contended that it was unfair for IHS to employ a user population figure that lagged behind the actual user population. According to the Tribe, this would make the Headquarters share inadequate to cover the cost of managing the HMO since the HMO costs were based on the actual number of tribe members enrolled in the HMO. IHS stated in response that its policy was to hold

¹⁸ During the telephone conference I held on May 21, 1999, the Tribe argued for the first time that, to calculate that part of the Headquarters share that would be used to administer the HMO, the actual enrollment figure for the HMO--which exceeded the higher user population figure of 4,069--should be used. Even if I may properly consider an argument not expressly raised in the Tribe's appeal, I do not do so here since the Tribe used only the 4,069 figure in its May 25, 1999 submission responding to my request for an example of how the Headquarters share would be calculated. Tribe's letter dated 5/25/99, at 1.

all tribes to the same user population figure for three to five years in order to aid the tribes in planning by making the amount of Headquarters shares more predictable. IHS stated that it was able to use a more recent user population figure to calculate the Tribe's Area tribal share because only two tribes were served by the Tucson Area Office. 5/21/99 telephone conference. (The most recent user population figures for these two tribes were presumably readily available.)

I conclude that the ALJ did not err in determining that IHS properly employed a user population figure of 3,839 to determine the Secretarial amount for Headquarters shares and that \$166,933 was the correct amount. Since all tribes are entitled to a share of Headquarters funding, the user population figures for all of the tribes must be known before any tribe's share can be determined. The Tribe did not dispute the ALJ's finding that these figures were not available at the time of the declination. Moreover, in view of the large number of tribes involved, I find that IHS acted reasonably in adopting a policy of recomputing the Headquarters shares only once every three to five years. In making a determination which affects tribes nationwide, IHS is not compelled to take the unique circumstances of one tribe into account as long as IHS's determination was not specifically intended to disadvantage that tribe. Thus, the fact that the Tribe's Area tribal share is based on a more recent user population figure or that its HMO costs are based on the current number of HMO enrollees does not mean that IHS unfairly used the 1995 user population figure to determine the Tribe's Headquarters share. Nevertheless, if more recent user population figures for all of the tribes nationwide are available in the period before the Tribe enters into a self-determination contract, the Tribe's Headquarters shares should be recalculated based on those figures.

4. Administration & Management and Chief Medical Officer

The basic methodology used by both parties to calculate each of these PFSA's was the same. First, they ascertained the amount of recurring funds allocated for

the PFSA by IHS to its Tucson Area Office. Next, they deducted the amount associated with IHS's residual functions, i.e., those functions which are inherently federal in nature and may not be contracted by tribes. Finally, they multiplied the remaining amount by the percentage of the user population of the two tribes serviced by the Tucson Area Office that was attributable to the Tribe. The parties disagreed as to the appropriate residual amount to be deducted from the amount of recurring funds.¹⁹ This dispute centered not on which functions are residual--as to which the parties agreed--but on the number of personnel, expressed as the number of full-time equivalent positions (FTE's) required to carry out the residual functions. The Tribe's contract proposal used 11.25 FTE's to calculate the Secretarial amount. The Tribe also determined in consultation with the Tohono O'odham Nation that the appropriate residual was two FTE's. The Tribe later said that it would accept a figure between 11.25 and 15 FTE's. Tribe's Objections to ALJ Decision, dated 5/10/99, at 31. IHS used 22.65 FTE's to calculate the Secretarial amount for the two PFSA's in question here.²⁰

The ALJ did not determine the amount of residual funds that should be used to calculate these two PFSA's. Instead, he noted that two of the three interested entities--the Tohono O'odham Nation and the Urban

¹⁹ In a letter dated 5/25/99, the Tribe asserted for the first time that IHS used the incorrect user population figure in calculating the Secretarial amounts for these PFSA's. At 2. According to the Tribe, the user population should have been 4,069 rather than 3,839. IHS responded that the record is clear that the higher figure was in fact used. IHS letter dated 5/25/99, at 1. The parties should consult to verify that the figure used was the one on which they both agree.

²⁰ IHS stated that this was the appropriate residual based on 1995 figures and that it would use a higher residual for any contract proposal made now. 5/21/99 telephone conference.

Program--were not parties to the matter pending before him. He therefore directed IHS to determine the FTE's for the residual functions "either through negotiations with, or issuance of an appealable decision to, all of the interested parties." ALJ Decision at 30.

Both parties appealed the ALJ's remand on this issue. The Tribe asserted that "[t]he ALJ's inability to resolve the . . . residuals issue . . . is evidence that the Secretary failed to meet her burden on this issue. Therefore, this matter must be resolved in favor of the Tribe." Tribe's Objections to ALJ Decision, dated 5/10/99, at 30. IHS took the position that the ALJ had implicitly determined the appropriate residual amount since the chart appended to the ALJ's decision (a reproduction of IHS Ex. HH) shows a Secretarial amount for each of the two PFSAs in question.

I find IHS's position that the ALJ resolved this issue untenable in light of the ALJ's express statement that he "would be remiss" in determining the number of FTE's for the residual functions and his remand to IHS to make this determination. ALJ Decision at 30. In this context, the chart must be read as merely showing what the Secretarial amount would be assuming that the residual amounts used in IHS's calculation were ultimately determined to be correct. I am also not persuaded by the Tribe's argument that the Secretary failed to meet her burden of proof on this issue. The record before the ALJ contains extensive evidence in support of IHS's calculation of the residuals. The ALJ's remand does not reflect any concern with the development of this issue in the record but rather reflects the ALJ's concern that the other two entities that would be affected by the calculation of residuals for the Tucson Area Office did not have sufficient input into the calculation.

However, the ALJ did not provide any basis for his finding that the consultation with these entities that had already occurred regarding the residuals was insufficient. (Indeed, both parties here agreed that no further consultation is necessary. 5/21/99 telephone conference.) Moreover, there is clearly no basis for the

ALJ's direction to IHS to issue a determination on residuals that is appealable by these entities since the ISDA provides a right to appeal only where IHS declines a proposed self-determination contract.

I therefore conclude that this matter should be remanded to the ALJ for a determination, based on the evidence currently in the record and any additional evidence the ALJ requires the parties to present, of the appropriate amount of FTE's to be used to calculate the residuals for purposes of determining the Secretarial amount for the two PFSA's in question. As indicated above with respect to Dental Service, even if there is adequate evidence in the present record to make a determination, this determination is appropriately made in the first instance by the ALJ.

5. Facilities Support

IHS declined in its entirety the Tribe's proposal to contract for Facilities Support. The Tribe calculated this amount by applying to the amount allocated to the Tucson Area Office for this PFSA in fiscal year 1997--\$126,550--the Tribe's percentage of the Area user population (based on IHS's FY 1996 user population figures)--17.88%. See Tribe's Response to Board Questions, dated 5/18/99, at 6. The ALJ found that the \$126,550 was used to support the operation and maintenance of buildings belonging to the Tohono O'odham Nation. Consequently, the ALJ concluded that those funds are not amounts that the Secretary would have otherwise provided to the Tribe and upheld IHS's declination of funding for this PFSA.

On appeal, the Tribe argued that IHS should not prevail merely because it showed that it would not have otherwise provided the Tribe with funds for facilities support. The Tribe pointed to the language of the ISDA stating that the Secretary must provide no less than the amount she would have otherwise provided "for the operation of the programs or portions thereof . . . without regard to any organizational level within the Department." I surmise that the Tribe's argument here is that the

Secretarial amount is not limited to the amount that IHS allocated for a PFSA to the particular tribe in question.

I do not find this argument persuasive, however. A self-determination contract permits a tribe to assume health care PFSA's previously administered by IHS. Thus, the quoted provision necessarily refers to the amount that IHS would have spent to provide a PFSA to the tribe now proposing to contract for its assumption. There is no dispute that IHS spent no funds for facilities support for the Tribe during the fiscal year in which the Tribe submitted its contract proposal. (This situation is unlikely to change unless IHS begins to provide direct services to the Tribe.) Thus, the ALJ reasonably determined that IHS would not have spent any funds for facilities support during any subsequent period in which the Tribe entered into a self-determination contract.

Conclusion

For the foregoing reasons, I conclude that the ALJ did not err in finding that IHS clearly demonstrated the validity of the declination with respect to the HMO component of the Contract Health Services PFSA, the Headquarters Shares PFSA and the Facilities Support PFSA. I remand the case with respect to the Dental Service component of the Contract Health Services PFSA, the Administration & Management PFSA, and the Chief Medical Officer PFSA to the ALJ for further proceedings consistent with this decision. Except as to the matters remanded, this is the final decision of the Department of Health and Human Services.

Donald F. Garrett
Member, Departmental
Appeals Board